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No. 03-701

In the Supreme Court of the United States

JAMES S. AND REBECCA DEATON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether wetlands that are adjacent to, and drain into, the headwaters of a nonnavigable intermittent stream, whose waters flow through a roadside ditch and several other channels and streams before reaching traditional navigable waters, are part of "the waters of the United States" within the meaning of the Clean Water Act, 33 U.S.C. 1362(7).

2. Whether application of the Clean Water Act to the wetlands at issue in this case is a permissible exercise of congressional authority under the Commerce Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 332 F.3d 698. A prior opinion of the court of appeals in this case is reported at 209 F.3d 331. The opinion of the district court (Pet. App. 27a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2003. A petition for rehearing was denied on August 11, 2003 (Pet. App. 52a). The petition for a writ of certiorari was filed on November 10, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this civil enforcement action under the Federal Water Pollution Control Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1251-1387, alleging that petitioners had violated the CWA by discharging dredged or fill material into "waters of the United States" without a permit. The district court ruled in the government's favor, holding that petitioners' discharges were prohibited by the CWA. Pet. App. 27a-49a. The court of appeals affirmed. *Id.* at 1a-26a.

1. Section 301 of the Clean Water Act prohibits the "discharge of any pollutant by any person," unless in compliance with the Act. 33 U.S.C. 1311(a). "Discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense.").[1] In *Riverside Bay-*

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C.

view, the Court upheld the assertion by the United States Army Corps of Engineers (Corps) of regulatory authority, under the CWA, over "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction." 474 U.S. at 135.

In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), this Court again construed the CWA term "waters of the United States." The Court in *SWANCC* held that use of "isolated" nonnavigable intrastate waters by migratory birds was not a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172. The Court stated, however, that "it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

2. The CWA sets up two complementary permitting schemes. Section 404(a) authorizes the Secretary of the Army, acting through the Corps, or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Under

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1362 and 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

Section 402, any discharge of pollutants other than dredged or fill material must be authorized by a permit issued by the United States Environmental Protection Agency (EPA) (or a State with an approved program) under the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1342. The Corps and EPA share responsibility for implementing and enforcing Section 404 of the CWA. See, *e.g.*, 33 U.S.C. 1344(b) and (c).

The Corps and EPA have promulgated identical regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). The definition, as it relates to this case, encompasses, *inter alia*, traditional navigable waters, which include tidal waters and waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "tributaries" to traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands that are "adjacent" to traditional navigable waters or their tributaries, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).

3. a. In November 1988, petitioner James S. Deaton "signed a contract to buy a twelve-acre parcel of land in Wicomico County, Maryland, subject to the condition that it was suitable for developing a small residential subdivision." *United States* v. *Deaton*, 209 F.3d 331, 333 (4th Cir. 2000) (*Deaton I*). Approximately half of the parcel consisted of wetlands. C.A. App. 183. Because portions of the property were wet, however, the Wicomico County Health Department denied petitioner's application for a sewage disposal permit. *Deaton I*, 209 F.3d at 333. Petitioners nevertheless decided to proceed with the purchase of the land, intending to drain the parcel by digging a ditch across

the property, and they acquired title to the parcel in June 1989. *Ibid.*

Before any ditching work had begun, the United States Soil Conservation Service (SCS) "advised Mr. Deaton * * * that a large portion of the property contained nontidal wetlands and that he would need a permit from the Corps before undertaking any ditching work." Pet. App. 4a; see *Deaton I*, 209 F.3d at 333. Petitioners did not file a permit application, however, but instead "hired a contractor who dug a 1,100-foot ditch that crossed the areas of the property identified as wetlands by the SCS technician. The contractor piled the excavated dirt on either side of the ditch, a practice known as sidecasting." Pet. App. 4a; see *Deaton I*, 209 F.3d at 333.

In July 1990, the Corps learned of petitioners' unpermitted ditching activity, inspected the site, and determined that the wetlands on the parcel were part of "the waters of the United States" within the meaning of the Clean Water Act. Pet. App. 4a-5a; *Deaton I*, 209 F.3d at 333. The Corps issued stop-work orders, warning that the placement of fill material in the wetlands on petitioners' property violated the CWA. Pet. App. 5a; *Deaton I*, 209 F.3d at 333. In 1995, after lengthy negotiations with petitioners failed to resolve the dispute, the United States initiated a civil enforcement action, alleging that petitioners were in violation of Sections 301 and 404 of the Clean Water Act, 33 U.S.C. 1311, 1344, by discharging dredged or fill material into "the waters of the United States" without a permit. Pet. App. 5a; *Deaton I*, 209 F.3d at 333.

b. The government's complaint alleged that petitioners' wetlands were subject to the CWA because they were "adjacent to Headwaters of Purdue Creek, a tributary of [the] Wicomico River." C.A. App. 9. To

demonstrate that connection, the Corps deposited a small amount of non-toxic dye into the intermittent headwater stream that flows onto petitioners' land from a neighboring parcel. See Pet. App. 67a-68a; C.A. App. 127, 131, 155. The Corps traced the flow of water into petitioners' wetlands, through the ditch that petitioners had excavated, and into a culvert that receives water from the road ditch that borders petitioners' property alongside Morris Leonard Road.[2] From that point, the Corps observed the dye flowing through the culvert to a ditch on the other side of Morris Leonard Road and then through several segments of Perdue Creek that have been straightened, channelized, and incorporated into a network of agricultural drainage ditches managed by the local Public Drainage Association. See Pet. App. 68a; C.A. App. 127, 131. The Corps documented the flow of dye to Beaverdam Creek, which the parties stipulated to be a perennial stream that flows directly into the Wicomico River, a traditional navigable water that in turn feeds into the Chesapeake Bay. Pet. App. 73a-74a. All told, water from petitioners' parcel flows for approximately eight miles to the Wicomico River, which flows for roughly 25 more miles to the Chesapeake Bay. *Id.* at 4a.

4. a. On September 22, 1997, on cross-motions for summary judgment, the district court granted summary judgment for the government on the issue of liability, holding that petitioners' property contained "wetlands" within the meaning of the Corps' regulations, and that the wetlands were part of "the waters of the United States" within the meaning of the CWA.

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[2] The Corps added additional dye along the way, "as necessary to maintain a detectable level for visual observation and photography." Pet. App. 68a.

C.A. App. 36-60. On June 23, 1998, however, the district court reconsidered its judgment in light of intervening Fourth Circuit authority. The court granted summary judgment for petitioners on the ground that the sidecasting of excavated material into wetlands did not constitute a "discharge" of dredged or fill material. *Id.* at 61-68. The court of appeals reversed that decision and remanded for further proceedings in the district court. *Deaton I*, 209 F.3d at 337; see Pet. App. 5a.[3]

b. The case remained pending in the district court on remand when this Court issued its decision in *SWANCC*. Relying on that decision, petitioners asked the district court to reconsider its prior determination that the wetlands on petitioners' property were subject to federal regulatory authority under the CWA. See Pet. App. 5a. On January 28, 2002, after conducting a site visit and a hearing, the district court reaffirmed its earlier grant of summary judgment for the United States on the question of liability. See *id.* at 29a-47a. The court explained that petitioners' wetlands, unlike the isolated ponds at issue in *SWANCC*, had a surface water connection to traditional navigable waters. *Id.* at 40a-41a. The court also held that federal regulation of petitioners' filling activities under the CWA was a permissible exercise of congressional authority under the Commerce Clause. *Id.* at 44a-46a. Addressing the question of remedy, the district court ordered petitioners to restore the parcel but did not impose a financial penalty. *Id.* at 47a-49a.

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[3] Petitioners do not seek further review of the court of appeals' determination that their activities effected a "discharge" of dredged or fill material.

5. The court of appeals affirmed. Pet. App. 1a-26a.

a. The court of appeals observed that it was "undisputed that [petitioners'] wetlands are adjacent to" (Pet. App. 7a)—and "that surface water from [petitioners'] property drains into" (*id.* at 3a)—a "drainage ditch [that] runs alongside the road between the pavement and [petitioners'] property" (*ibid.*). The court further explained that, while the parties "disagree about how much water flows through the ditch, and how consistent the flow is, * * * they agree on the ditch's course" of flow to the Wicomico River eight miles away. *Ibid.* The court of appeals stated that its analysis would "focus on whether the Corps has jurisdiction over the roadside ditch," because "if the ditch is covered, so are the [adjacent] wetlands." *Id.* at 7a (citing *Riverside Bayview*).

b. The court of appeals held that the Corps' exercise of regulatory authority in this case "fits comfortably within Congress's authority to regulate navigable waters." Pet. App. 8a. The court explained that "[t]he power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce"—the first of the three established categories of permissible Commerce Clause regulation identified by this Court in *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995). Pet. App. 10a. The court further observed that "[t]he power over navigable waters also carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters." *Id.* at 12a. The court explained that, because "[a]ny pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves," the Corps' decision to "regulat[e] nonnavigable

tributaries and their adjacent wetlands * * * is well within Congress's traditional power over navigable waters." *Id.* at 13a. The court also rejected petitioners' contention that application of the CWA to their conduct was improper because their own activities were "too trivial to affect water quality in navigable waters." *Ibid.* The court explained that, under established Commerce Clause principles, Congress "may decide that the aggregate effect of all of the individual instances of discharge * * * justifies regulating each of them." *Ibid.*

c. The court of appeals held that the Corps had reasonably interpreted its "[t]ributaries" regulation (33 C.F.R. 328.3(a)(5)) to encompass the roadside ditch in this case. Pet. App. 16a-18a. The court observed that the plain meaning of the word "tributary" includes "a watercourse like the roadside ditch" that flows into another larger body of water. *Id.* at 18a. The court rejected petitioners' contention that "the term 'tributary' in the [Corps'] regulation refers only to a non-navigable branch that empties directly into a navigable waterway" rather than into another tributary. *Ibid.* The court explained that, "[a]lthough the Corps has not always chosen to regulate all tributaries, it has always used the word to mean the entire tributary system, that is, all of the streams whose water eventually flows into navigable waters." *Id.* at 19a. "Because the Corps's longstanding interpretation of the word 'tributary' has support in the dictionary and elsewhere," the court of appeals deferred to the Corps' determination that the roadside ditch in this case is a "tributary" within the meaning of the pertinent regulation. *Id.* at 19a-20a.

d. The court of appeals held that the Corps' "tributaries" regulation, construed to encompass the roadside ditch at issue here, reflected a permissible construction

of the CWA. Pet. App. 20a-22a. The court explained that this Court in *Riverside Bayview* had upheld the Corps' regulation of adjacent wetlands "in part because of what *SWANCC* described as 'the significant nexus between the wetlands and "navigable waters."'" *Id.* at 22a (quoting *SWANCC*, 531 U.S. at 167). The court of appeals stated that "[t]here is also a nexus between a navigable waterway and its nonnavigable tributaries" because "discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters." *Ibid.* The court found that nexus "sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not squarely conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 10-12, 13-14) that the court of appeals' construction of the CWA as applying to the wetlands on their property is inconsistent with this Court's decisions in *Riverside Bayview* and *SWANCC*. Petitioners read those decisions as limiting federal regulatory authority under the CWA to waters having a "significant nexus" to traditional navigable waters, and they assert that such a nexus is absent here. Petitioners' claim lacks merit.

a. The Corps' delineation of its own regulatory authority under the CWA has long been premised on the fact that, because "[w]ater moves in hydrologic cycles," pollution of waters that do not themselves meet traditional tests of navigability "will affect the water quality of the other waters within that aquatic system."

Riverside Bayview, 474 U.S. at 134 (quoting 42 Fed. Reg. 37,128 (1977)); see Pet. App. 13a ("[T]he principle that Congress has the authority to regulate discharges into nonnavigable tributaries in order to protect navigable waters has long been applied to the Clean Water Act."); *id.* at 22a (accepting, as reasonable and supported by the evidence, the Corps' contention that "discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in [traditional] navigable waters"). Exclusion of nonnavigable tributaries and their adjacent wetlands from the coverage of the CWA would subvert Congress's efforts to ensure that the quality of traditional navigable waters is adequately protected. To prevent that result, the Corps and EPA have reasonably defined the term "waters of the United States" to include wetlands adjacent to tributaries that flow into traditional navigable waters.

b. This Court's decision in *SWANCC* does not cast doubt on the propriety of that regulatory determination. To the contrary, the Court in *SWANCC* quoted with apparent approval its prior holding that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" 531 U.S. at 167 (quoting *Riverside Bayview*, 474 U.S. at 134). And while the Court in *SWANCC* rejected the Corps' construction of the term "waters of the United States" as encompassing isolated ponds based on their use as habitat for migratory birds, *id.* at 171-172, its reasoning does not cast doubt on the propriety of the Corps' assertion of regulatory authority here.

The Court in *SWANCC* explained that, if the use of isolated ponds by migratory birds were found to be a

sufficient basis for federal regulatory jurisdiction under the CWA, the word "navigable" in the statute would be rendered superfluous. 531 U.S. at 172. While recognizing that the term "navigable waters" as used in the CWA includes "at least some waters that would not be deemed 'navigable' under the classical understanding of that term," *id.* at 171 (quoting *Riverside Bayview*, 474 U.S. at 133), the Court stressed that the word "navigable" must be given some substantive content, see *id.* at 172 ("[I]t is one thing to give a word limited effect and quite another to give it no effect whatever."). The Court concluded that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

Unlike the Corps' prior effort to regulate "isolated" waters used as habitat by migratory birds, the regulation of petitioners' filling activities rests squarely on the agency's longstanding authority to protect traditional navigable waters. "Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves." Pet. App. 13a. Construing the CWA term "waters of the United States" to encompass wetlands adjacent to tributaries that flow into traditional navigable waters thus gives independent content to the term "navigable," and accords with the established understanding of congressional power to regulate and protect traditional navigable waters. See *id.* at 12a-13a, 17a-18a; *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 525-526 (1941) (Congress may authorize flood control projects on intrastate nonnavigable tributaries

in order to prevent flooding in traditional navigable rivers); see also *United States* v. *Rapanos*, 339 F.3d 447, 450-453 (6th Cir. 2003) (upholding CWA jurisdiction over wetlands that flow through a man-made ditch and nonnavigable natural tributary to reach traditional navigable waters 11 to 20 miles downstream), petition for cert. pending, No. 03-929 (filed Dec. 22, 2003); *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526, 533-534 (9th Cir. 2001) (upholding CWA jurisdiction over nonnavigable irrigation canals that receive water from, and divert water to, natural streams and lakes). The demonstrated risk that pollutant discharges into tributaries and their adjacent wetlands will ultimately impair the quality of traditional navigable waters, and the proven surface water connection between the wetlands on petitioners' property and the Wicomico River (and ultimately the Chesapeake Bay), together establish a "significant nexus" between petitioners' wetlands and traditional navigable waters.

c. Concededly, not every discharge of fill material into "the waters of the United States" (as the Corps and EPA have defined the term) can be expected to have deleterious effects on the quality of traditional navigable waters. That fact, however, does not cast doubt on the propriety of the agencies' adjacent wetlands regulations. As the Court in *Riverside Bayview* explained:

> [I]t may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." * * * That the definition may include some wetlands that are not significantly intertwined with the ecosystem

> of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

474 U.S. at 135 n.9. Thus, inclusion of petitioners' wetlands within the regulatory definition of "waters of the United States" does not mean that filling of such wetlands is necessarily prohibited. It simply means that the Corps will analyze (and attempt to mitigate) the likely impacts of proposed discharges on federal interests before deciding whether a particular project may go forward. By discharging pollutants into those wetlands without seeking a Section 404 permit, petitioners prevented the Corps from making that determination.

d. Petitioners contend (Pet. 13-14) that, even if the roadside ditch at issue in this case is part of the "waters of the United States" within the meaning of the CWA, the Corps lacked regulatory authority over the wetlands adjacent to that ditch. Petitioners rely on this Court's statement in *SWANCC* that the Corps' authority under the CWA does not "extend[] to ponds that are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168. Petitioners construe the term "open water," as it appears in the *SWANCC* opinion, to refer solely to traditional navigable waters, and they observe that the wetlands on petitioners' property are not adjacent to "open water" so defined. See Pet. 14.

Petitioners' effort to equate the term "open water" with traditional navigable waters is unfounded. When the Court in *SWANCC* referred to ponds "that are *not*

adjacent to open water," 531 U.S. at 168, it was alluding to a footnote in *Riverside Bayview* in which the Court had reserved the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, see 33 C.F.R. §§ 323.2(a)(2) and (3) (1985)." *Riverside Bayview*, 474 U.S. at 131-132 n.8 (quoted in *SWANCC*, 531 U.S. at 167-168). When that footnote is read in context, it is clear that the Court in *Riverside Bayview* was reserving the question of jurisdiction over wetlands that are isolated from, rather than adjacent to, any other covered waters, without regard to navigability.[4]

Elsewhere in the *Riverside Bayview* opinion, moreover, the Court used the phrase "open water" as a shorthand for "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters,'" in order to distinguish those types of water bodies from wetland areas, such as "shallows, marshes, mudflats, swamps, [and] bogs." *Riverside Bayview*, 474 U.S. at 131-132. The Court did not use the phrase "open water" to distinguish navigable from nonnavigable streams. See, *e.g.*, *id.* at 134 (using the phrase "adjacent bodies of open water" interchangeably with "adjacent lakes, rivers, and streams," without reference to

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[4] The pertinent footnote in *Riverside Bayview* cited 33 C.F.R. 323.2(a)(2) and (3) (1985), which have since been re-codified at 33 C.F.R. 328.3(a)(2) and (3). Those are the subsections of the regulatory definition of "waters of the United States" that cover interstate and isolated intrastate wetlands, respectively. If, by referring to "wetlands that are not adjacent to bodies of open water," the Court had meant to include wetlands adjacent to nonnavigable tributaries, it would presumably have cited as well 33 C.F.R. 323.2(a)(5) and (7) (1985), which encompass nonnavigable tribuaries and wetlands adjacent to those tributaries.

navigability). Finally, under petitioners' interpretation of the term "open water," the CWA would not encompass wetlands adjacent to nonnavigable tributaries, even if those tributaries are themselves "waters of the United States." That view cannot be reconciled with *Riverside Bayview*'s square holding that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Riverside Bayview*, 474 U.S. at 135.

2. Contrary to petitioners' contention (Pet. 12-13), the Fourth Circuit's decision in this case does not squarely conflict with any decision of another court of appeals.

a. Petitioners' reliance (Pet. 12-13) on *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), is misplaced. *Rice* addressed the question whether the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, imposed liability on parties who discharged oil onto dry ground, where that oil was alleged to have migrated into various types of waters. Like the Clean Water Act, the OPA regulates discharges into "navigable waters," defined as "the waters of the United States." 33 U.S.C. 2701(21); see 33 U.S.C. 2702(a). The term is generally understood to have the same meaning under both statutes. See *Rice*, 250 F.3d at 267-268.

The court in *Rice* rejected each of three suggested bases for the imposition of OPA liability. First, the Fifth Circuit addressed the question whether the OPA regulated "discharges of oil that contaminate the groundwater," and it held that "subsurface waters are not 'waters of the United States' under the OPA." 250 F.3d at 270. Second, the court in *Rice* addressed the plaintiffs' contention that "surface waters on the [property] are directly threatened by [the defendant's]

discharges into the groundwater." *Ibid.* The court found that all discharges were onto dry land and that there was no evidence of any discharge directly into surface water. *Ibid.* The court further concluded that, even if the discharges could be shown to have seeped into the surface waters on the ranch, the record was insufficient to support a determination that those waters were part of "the waters of the United States." The court explained that the record in the case contained "no detailed information about how often the creek runs, about how much water flows through it when it runs, *or about whether the creek ever flows directly (above ground) into the Canadian River.*" *Id.* at 270-271 (emphasis added). Absent proof of a surface connection between the creek in question and any traditional navigable water, the court was unable to conclude that the creek was "sufficiently linked to an open body of navigable water as to qualify for protection under the OPA." *Id.* at 271. Third, the court in *Rice* addressed the question whether "discharges into groundwater that migrate into protected surface waters" are covered by the OPA. *Ibid.* The court held that the OPA does not apply to "discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272.

Thus, the Fifth Circuit's decision in *Rice* was premised on the absence of any demonstrated surface water connection between the allegedly contaminated seasonal creek and any traditional navigable water. The decision therefore does not conflict with the Fourth Circuit's ruling in the instant case, which upheld the exercise of federal regulatory authority under the CWA based on the presence of such a connection.

b. For similar reasons, the Fifth Circuit's recent decision in *In re Needham*, No. 02-30217, 2003 WL 22953383 (Dec. 16, 2003), issued after the filing of the certiorari petition in the instant case, does not squarely conflict with the Fourth Circuit's decision here. *Needham*, like *Rice*, involved a suit under the OPA. See *id.* at *1. The oil at issue in *Needham* "was originally discharged into [a] drainage ditch at Thibodeaux Weil," and from there "spilled into Bayou Cutoff, and then into Bayou Folse. Bayou Folse flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico." *Ibid.* The Fifth Circuit held that the defendants' conduct was covered by the OPA. *Id.* at *4-*5. The court stated that "the proper inquiry is whether Bayou Folse, the site of the farthest traverse of the spill, is navigable-in-fact or adjacent to an open body of navigable water." *Id.* at *4. The Fifth Circuit found that "Bayou Folse is adjacent to an open body of navigable water, namely the Company Canal," *ibid.*; and it concluded on that basis that "the Thibodeaux Well oil spill implicated navigable waters and triggered federal regulatory jurisdiction pursuant to the OPA," *id.* at *5.

In the course of its analysis, the Fifth Circuit appeared to disapprove the results reached by the Fourth and Sixth Circuits in the instant case and *Rapanos*, and it stated that "[t]he CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters." *Needham*, 2003 WL 22953383, at *3. That statement was dictum, however, in light of the *Needham* court's determination that the oil spill actually involved in that case was covered by the OPA. And while the *Needham*

court stated that "both the regulatory and plain meaning of 'adjacent' mandate a significant measure of proximity," *id.* at *5 n.12, and that "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway," *id.* at *5, the court did not offer a precise rule for determining when a nonnavigable tributary is "adjacent" to a traditional navigable water. Thus, even assuming that the Fifth Circuit decides to follow the *Needham* dictum in a future case where the issue is actually presented, it is unclear to what extent the approaches taken by the Fourth and Fifth Circuits would lead to different results in concrete factual settings.

It should also be noted that the Fifth Circuit in *Needham* sustained the application of the OPA to the defendants' conduct based on the ultimate downstream presence of oil in Bayou Folse. See 2003 WL 22953383, at *4-*5; p. 18, *supra.* The court did not examine whether the drainage ditch (the site of the original discharge) or Bayou Cutoff (the body of water into which the ditch directly flowed) was itself "adjacent" (as the court understood that term) to any traditional navigable water. Rather, the court framed the relevant question as "whether Bayou Folse, the site of the farthest traverse of the spill," satisfied the court's adjacency requirement. *Needham*, 2003 WL 22953383, at *4.

Thus, where it can be shown that an oil discharge has actual downstream effects, the Fifth Circuit (correctly) regards the OPA as applicable even if the first water body into which oil is discharged does not meet the court's standard for being "actually navigable or * * * adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. The Fifth Circuit may also decide, in an appropriate future case, that an upstream discharge is

covered by the OPA where the downstream effects of an oil discharge are potential rather than actual (*e.g.*, where remedial measures prevent discharged oil from reaching waters that the Fifth Circuit regards as "adjacent" to traditional navigable waters). The Fifth Circuit's willingness to consider the downstream effects of an oil discharge in determining the applicability of the OPA further diminishes the current practical significance of that court's dictum expressing apparent disagreement with the regulatory approach adopted by the government and sustained by the Fourth Circuit in this case.

3. Petitioners' other statutory arguments (Pet. 23-28) lack merit as well.

a. Contrary to petitioners' contentions, the court of appeals did not err in upholding the Corps' exercise of regulatory authority even in the absence of unambiguous language in the CWA encompassing the waters at issue here (see Pet. 23-25), and the court correctly deferred to the expert agencies' construction of the CWA term "waters of the United States" as encompassing wetlands adjacent to tributaries of traditional navigable waters (see Pet. 25-26). *Riverside Bayview* squarely held that the Corps and EPA may assert regulatory authority over at least *some* wetlands and other waters that do not themselves meet traditional standards of navigability, based on their hydrological connections to traditional navigable waters. *SWANCC* did not cast doubt on that proposition. Because Congress did not specify *which* wetlands and tributaries have a sufficient nexus to traditional navigable waters to justify federal constraints on pollutant discharges, the expert agencies to which Congress entrusted the Act's administration must necessarily exercise a measure of discretion in determining the scope of the

CWA's coverage. The regulatory definition of "waters of the United States" promulgated by the Corps and the EPA is therefore entitled to judicial deference. See Pet. App. 17a-18a ("The statutory term 'waters of the United States' is sufficiently ambiguous to constitute an implied delegation of authority to the Corps; this authority permits the Corps to determine which waters are to be covered within the range suggested by *SWANCC*."); cf. *Riverside Bayview*, 474 U.S. at 134 ("In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.").

b. There is also no merit to petitioners' contention (Pet. 27-28) that the Corps' assertion of regulatory authority here is inconsistent with the agency's historical practice. Petitioners state (Pet. 27) that "[f]rom the CWA's passage until the 1990s, the Corps explicitly stated that drainage and irrigation ditches are *not* 'waters of the United States.'" That is incorrect. The Corps stated in the preamble to a 1986 regulation that it "generally do[es] not consider * * * [n]on-tidal drainage and irrigation ditches *excavated on dry land*" to be part of "the waters of the United States" within the meaning of the CWA. 51 Fed. Reg. 41,217 (1986) (emphasis added). Even with respect to that category of ditches, however, the Corps expressly "reserve[d] the right on a case-by-case basis to determine that a particular waterbody * * * is a water of the United States." *Ibid.* In any event, the ditches involved in this case, which were excavated in part through wetlands and which re-diverted a pre-existing intermittent

stream (see Pet. App. 71a-73a, 75a; C.A. App. 127, 131), were not "excavated on dry land" within the meaning of the 1986 preamble. There is consequently no basis for petitioners' claim that the Corps has historically disclaimed regulatory authority over ditches of the sort at issue here. See also 65 Fed. Reg. 12,823-12,824 (2000) (providing further clarification of when the Corps will treat water in drainage ditches as part of "the waters of the United States" for purposes of the CWA).

4. Petitioners contend (Pet. 14) that the court of appeals' Commerce Clause analysis "is inconsistent with this Court's precedents and conflicts with other circuits." Every court of appeals that has addressed the question, however, has held that the CWA may constitutionally be applied to nonnavigable tributaries and their adjacent wetlands.[5] Petitioners' constitutional challenge lacks merit and does not warrant this Court's review.

a. Petitioners appear to concede (see Pet. 15) that the Commerce Clause vests Congress with authority to regulate activities in upstream nonnavigable waters in order to prevent harm to traditional navigable waters

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[5] See, *e.g.*, *United States* v. *Pozsgai*, 999 F.2d-719, 733-734 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994); *United States* v. *Tull*, 769 F.2d 182, 185 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *United States* v. *Hartsell*, 127 F.3d 343, 348 (4th Cir. 1997), cert. denied, 523 U.S. 1030 (1998); *United States* v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325-1329 (6th Cir. 1974); *United States* v. *Byrd*, 609 F.2d 1204, 1210 (7th Cir. 1979). See also *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 n.21 (1981) (citing favorably to *Ashland Oil* and *Byrd* and agreeing that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of [intrastate] activities causing air or water pollution, or other environmental hazards that may have effects in more than one state").

downstream. Petitioners contend, however, that Congress may exercise that authority "only upon findings or evidence demonstrating that the activity at issue will actually impact navigable waters." *Ibid.* Petitioners' demand for case-specific proof of harm to traditional navigable waters is misconceived. The courts have long recognized that pollution and environmental degradation in the nonnavigable portion of a tributary system can be expected, as a general matter, to have an adverse effect on water quality in the traditional navigable waters to which those tributaries lead.[6] That valid generalization, combined with case-specific proof (through the dye test and other evidence) of a surface water connection between petitioners' wetlands and traditional navigable waters, provides a constitutionally sufficient basis for federal regulation of petitioners' discharges.[7]

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[6] As the Sixth Circuit has explained:

> It would, of course, make a mockery of [Congress's Commerce Clause] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.
>
> Such a situation would have vast impact on interstate commerce.

United States v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974).

[7] Petitioners argue (Pet. 16) that the court of appeals' analysis was flawed because "[n]othing in the record suggests that dirt left [petitioners'] property, flowed through the roadside ditch, or reached, much less degraded, downstream navigable waters." Petitioners' construction work was halted, however, soon after it began. Congress is not required to wait until harm to traditional navigable waters actually materializes; Congress can act to pre-

b. Petitioners' demand for case-specific proof of harm, as a constitutional prerequisite to the Corps' assertion of regulatory authority under the CWA, is also in considerable tension with this Court's analysis in *Riverside Bayview*. The Court in *Riverside Bayview* noted the possibility that the term "waters of the United States," as defined in the Corps' regulations, "may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways." 474 U.S. at 135 n.9. The Court found that prospect to be "of little moment," however, because the Corps in such circumstances may allow development to go forward simply by issuing a permit. *Ibid.*; see pp. 13-14, *supra*.

Although the Court in *Riverside Bayview* was not confronted with a Commerce Clause challenge to the Corps' regulation, that aspect of its analysis sheds considerable light on the constitutional question presented here. Congress's authority to prevent pollutant discharges that will actually degrade the quality of traditional navigable waters necessarily includes the power to devise reasonable procedures for determining, *before* a particular discharge occurs, whether the

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vent that harm by prohibiting or controlling particular activities in nonnavigable waters upstream. See, *e.g.*, *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941) (Congress has power to control activities in nonnavigable tributaries in order to prevent flooding downstream). The harm caused by discharges of dredged or fill material into wetlands, moreover, is not limited to the potential for sediment to be released downstream. An even greater potential for harm arises from the *filling* of wetlands, which reduces or destroys their capacity to perform a variety of essential hydrological and ecological functions, such as filtering and absorbing pollutants from runoff and storing flood waters. See *Riverside Bayview*, 474 U.S. at 134-135; *Deaton I*, 209 F.3d at 336.

discharge is likely to have that effect. The Section 404 permitting process serves in part to assist the Corps in making that determination. The regulatory regime would be severely undermined if the Corps were required to prove a likelihood of harm to traditional navigable waters in each case before the Section 404 requirements could be triggered.

c. As the court of appeals recognized, Congress may regulate a broad class of pollutant discharges, notwithstanding the "trivial" impact on traditional navigable waters of a single individual's conduct, if "the aggregate effect of all of the individual instances of discharge, like the discharge by [petitioners], justifies regulating each of them." Pet. App. 13a. Petitioners contend (Pet. 19) that the court of appeals erred by applying that aggregation principle to a *Lopez* "sphere 1" analysis, which governs federal regulation of the "channels of commerce." Petitioners argue (Pet. 20) that the aggregation principle can be employed only in a *Lopez* "sphere 3" analysis, which asks whether the regulated activities, when viewed in the aggregate, have a "substantial effect[]" on interstate commerce.

The cases cited by petitioners (Pet. 20 & n.9), however, do not support their claim. Those cases state that, where Congress seeks to regulate the channels of commerce, it is not *necessary* to demonstrate that the class of regulated activities substantially affects interstate commerce. Those decisions do not hold that Congress is foreclosed from relying on aggregate effects when deciding whether and how to protect the channels of commerce (*e.g.*, traditional navigable waters) from potentially harmful upstream activities.

d. Petitioners contend (Pet. 21) that the exercise of federal regulatory authority in this case cannot withstand scrutiny under the Commerce Clause because it

obliterates the distinction between what is national and what is local. Their argument, however, relies on the mistaken premise that, by asserting CWA jurisdiction over tributary streams that have been straightened, channelized, and incorporated into the local Public Drainage Association (PDA), the Corps has effectively "federaliz[ed]" that local drainage system. Pet. 22. In fact, the only activity in a PDA ditch or stream that requires a CWA permit is the discharge of a pollutant from a point source into that ditch or stream. Other functions and activities relating to agricultural drainage issues remain in the hands of the local authorities.

In *SWANCC*, this Court found that application of the CWA to intrastate, nonnavigable, isolated waters, based on the presence of migratory birds, would raise serious constitutional questions in part because such regulation would intrude on traditional state and local control over land and water use. See 531 U.S. at 172-173. The isolated waters at issue in *SWANCC*, however, had no hydrological connection, and the asserted basis for CWA jurisdiction bore no relation, to traditional navigable waters. By contrast, the ditch and wetlands at issue here have an undisputed surface water connection to the Wicomico River, and ultimately to the Chesapeake Bay. Because the Corps' exercise of regulatory authority over petitioners' discharges serves the quintessential federal goal of protecting and enhancing water quality in traditional navigable waters, this case implicates core federal interests that were not present in *SWANCC*. See pp. 11-13, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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